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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 12th January 2011

No. 395—li/1(B)-113/2001-LE.—In pursuance of Section 17 of the Industrial Disputes Act 1947 (14 of 1947), the Award, dated the 30th October 2010 in Industrial Dispute Case No. 292 of 2008 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of Hawkins Cookers Ltd., Mumbai and its workman Shri Hrusikesh Swain was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE NO. 292 OF 2008 (PREVIOUSLY REGISTERED

AS I. D. CASE NO. 50 OF 2002 IN THE FILE OF THE P.O., LABOUR COURT, BHUBANESWAR)

Dated the 30th October 2010

Present :

Shri Raghbir Dash, o.s.j.s. (Sr. Branch),
Presiding Officer,
Industrial Tribunal, Bhubaneswar.

Between :

The Management of Hawkins Cookers Ltd., .. First Party—Management
Udyog Mandir, Pitambar Lane,
Mahim Post Box No. 6481,
Mumbai (Bombay)-400016

And

Their Workman .. Second Party—Workman
Shri Hrusikesh Swain,
At. Alijoda, P.O. Kuanpal, Dist. Cuttack
PIN-754 204.

Appearances :

For the First Party—Management	..	S. T. Ullah, Authorised representative.
For the Second Party—Workman	..	Shri Subrat Ku. Misra, Advocate

AWARD

This is a reference of an industrial dispute u/s 10 of the Industrial Disputes Act, 1947 (for short the Act) made by the Government of Orissa in Labour & Employment Department vide their Order No. 4401—li-1(B)-113/2001-LE., dated the 4th April 2002 which was originally referred to the Presiding Officer, Labour Court, Bhubaneswar for adjudication but subsequently transferred to this Tribunal for adjudication vide Labour & Employment Department's Order No. 4138—li-21-32/2007-LE., dated the 4th April 2008. The Schedule of reference runs as follows :—

“Whether the termination of services of Shri Hrusikesh Swain by the way of refusal of employment by the management of M/s Hawkins Cookers Ltd., with effect from the 1st October 1998 is legal and/or justified ? If not, what relief Shri Swain is entitled to ?”

2. The case of the second party is that in terms of a contract dated the 6th February 1997 he was appointed by the first party as a Demonstration Representative (for short 'D.R.') in the State of Orissa and he was directed to report and perform duty under the first party's local Agency called "M/s Premier Trading Company". His duty was to promote and enhance the sale of products of the first party-Company. For that the Company was to pay Rs. 30 as daily allowance besides performance based commission. The second party rendered services to the best satisfaction of the first party but all on a sudden he was not permitted to discharged his duties with effect from the 1st October 1998. He was from services on the verbal orders of the first party without being given an opportunity to know the reasons of his disengagement. When the second party raised the dispute before the local labour agency, the management disputed his claim on the ground that he was not a 'workman'. As the conciliation proceeding ended in a failure report, the present dispute was referred for adjudication.

3. In the written statement the first party has admitted that under a contract the second party was engaged as a D.R. in the State of Orissa but it has denied that the second party was discharged from service contending that the predominant activity of the second party being to canvass and demonstrate the products of the company to the consumers for the purpose of boosting of their sale for which he used to get commission based on sale of the products and having the liberty to pursue any other avocation during the subsistence of the contract, the second party was not a 'workman' as defined in clause (s) of Section 2 of the Act and there was no employer-employee relationship between the parties.

4. The following issues have been framed :—

ISSUES

- (i) “Whether the termination of services of Shri Hrusikesh Swain, by the way of refusal of employment by the management of M/s Hawkins Cookers Ltd., with effect from the 1st October 1998 is legal and/or justified ?
- (ii) If not, what relief Shri Swain is entitled to ?”

5. The second party has examined himself as W.W. No. 1. On behalf of the management two witnesses have been examined. M.W. No. 1 is a staff of M/s Premier Trading Company. M.W. No. 2 is a Senior General Manager of the first party.

FINDINGS

6. *Issue No. (i)*— In the pleading and also in the evidence of W.W. No. 1 it is stated that on the 6th February 1997 the second party was appointed as a D.R. and he worked under the first party till the 30th September 1998. The first party in its written statement has admitted to have appointed the second party on the 6th February 1997 but there is no pleading as to from which date the contract between the parties got terminated. There is also no pleading as to under what circumstances the engagement of the second party disrupted but in his evidence M. W. No. 2 has stated beyond pleading that when the bills submitted by the second party were audited it was found that he had submitted bills for alleged demonstrations held by him but in fact, on enquiry, it was found that in facts he had not held demonstrations as claimed. It is further stated by M.W. No. 2 that when this fact was confronted to the second party, he stopped giving demonstrations and thereby terminated the contract. He has stated that the first party had never stopped him from doing work.

7. At the time of argument it is submitted on behalf of the management that the second party has failed to discharge the onus of proving that he had completed 240 days of work during the twelve calendar months preceding the date of the alleged termination. It is also submitted that the second party ought to have made a specific plea in the claim statement that he had completed one year of continuous service as defined u/s 25-B of the Act. It is true that in the claim statement it is not directly mentioned that the workman completed 240 days of work or rendered continuous service from the date of his appointment till the date of the alleged termination. But, the pleadings contained in the claim statement as a whole makeout that the second party has claimed to have rendered services to the first party from the date of appointed till the date of alleged retrenchment. The management having not made any specific plea that the workman has not rendered continuous service during the said period, it is to be presumed that the management has admitted that the second party rendered services as a D.R. from the date of his appointment till the date of alleged retrenchment. The workman has exhibited copy of monthly statements marked Ext. 9 series but the management takes the plea that those are not genuine. Ext. 9 series reflect though indirectly, that the second party was performing his duties regularly and without any break. The management has not brought on record any documents wherefrom it can be ascertained as to for how many days the second party had performed his duties during the span of his engagement. Had it been denied by the first party in its written statement that the workman had completed the minimum period of continuous service as required u/s 25-B of the Act, the onus would have been placed on the workman to prove that he had completed continuous service during the period. Taking the pleadings and evidence into consideration, it is to be held that the second party had rendered services to the first party from the 6th February 1997 to the 30th September 1998 continuously.

8. It is stated by M. W. No. 2 that the workman had submitted false bills and when confronted with such misconducts he stopped giving demonstrations and thereby terminated the contract.

The second party says that without assigning any reason the first party refused him employment with effect from the 1st October 1998. The first party has not made any communication to the second party on the alleged misconduct nor has it issued any communication on the termination of the contract. Since the contract of appointment was in writing, the management ought to have made written communication to the second party on the alleged misconducts as well as on the termination of the contract. In the absence of such written communication and in the absence of pleading as to why and how the contract was brought to an end, it is to be presumed that the second party was refused work by the first party with effect from the 1st October 1998. If it is ultimately held that employer-employee relationship exists between the parties and the second party is held to be a 'workman' as defined in the Act, then the termination of the services of the second party will be deemed to be illegal.

9. Now, the point on existence of employer-employee relationship may be thrashed out.

The first party takes the stand that the second party was offered a contract for rendering services as a D.R. as outlined in the body of contract; that the predominant activity of the D.R. was to canvass and demonstrate the goods of the company for boosting the sale of its products; that the second party was entitled to commission on the number of products sold, besides daily allowance, demonstration allowance, bus/railway fare and allowance for night halt outside Bhubaneswar and that the contract gave absolute opportunity to the second party to pursue any other avocation besides rendering services as a D.R. for the reason that there was no prescription of any minimum hours/days of work to be performed by the second party. Ext. A is the contract. It has laid down the terms and conditions of the contract in details. The relevant conditions may be narrated hereunder :—

(1) The second party was required to contact consumers home-to-home within the district of Orissa and in areas specified by the first party for conducting demonstrations and booking orders for the management's products.

(2) The canvassing and demonstration should be conducted by the second party as per the instructions given to him from time to time;

(3) The second party would direct customers to the selected dealer giving them special discount coupons at the time of demonstration so that the customers would be given special price by such dealer against the coupons issued by the second party;

(4) The second party should be entitled for commission based on the number of units of the products sold by the dealer against the coupons issued by the second party, besides working allowance for each day of satisfactory work, second class railway fare/ bus fare for the journey undertaken by him for carrying out his work, night allowance and demonstration allowance;

(5) The first party should train the second party appropriately for the services;

(6) The first party should provide the second party requisite samples, literatures etc. and on the termination of contract the second party should return all products, stationery items and other properties of the Company;

- (7) The second party should deposit Rs. 1,000 as security deposit;
- (8) The contract might be terminated by either party without notice and without assigning any reason.

Employer-employee relationship exists where the employer has the right to supervise and control the work done by the employee not only in the matter of directing what work a workman is to do but also the manner in which he shall do his work. However, the nature and extent of control varies from business to business. From the terms of the contract it can be found that the second party was required to render his services strictly in accordance with the instructions given to him by the first party; that the payment of working allowance for each day's work was dependant on the fact that the second party worked satisfactorily as per the guidance of the first party; that the second party was required to undergo appropriate training to make him able to render the services properly; that the management was required to supply products, stationeries, etc. to the second party for the purpose of conducting demonstrations moving from area to area to be specified by the management; and that the second party was to receive working allowance, demonstration allowance etc. in lieu of the services rendered by him according to the management's instructions. Considering all these terms and conditions, this Tribunal is of the considered view that the first party had the right to supervise and control the work of the second party not only in the matter of what work the second party was to do, but also the manner in which he was required to do the work. The second party was thus under the control and supervision of the employer in respect of the details of the work he was required to perform. Therefore the inevitable finding is that the second party was not a contractor but a workman employed by the first party for the purpose of making conversation and giving demonstration to the prospective consumers of the management's products to promote its sale.

10. The next point for determination is as to whether the second party is coming within the definition of the term 'workman' as defined u/s 2 (s) of the Act.

It is not in dispute that the second party was appointed as a D.R. in the State of Orissa to promote the sale of products of the first party and his primary or pre-dominant activity was to organise demonstrations before and canvassing with the prospective consumers to persuade them to buy the company's products. Neither of the parties has adduced evidence to show that the second party was required to do any other work for the first party. In support of the contention that the second party is a 'workman' reliance has been placed on Indian Banks Association *Vrs* workmen of Syndicate Bank, reported in AIR 2001 (S.C.) 946. On the other hand, reliance is placed by the management on a decision of the Hon'ble Bombay High Court, reported in 1995 LLR 906(B.S. Kurup *Vrs* Bicycle Corporation of India Ltd.) besides some other decisions.

In Indian Banks Association case (supra), it is held that the Deposit Collectors in Banks are 'workmen' within the meaning of the Act. A careful reading of the judgement would reveal that the Deposit Collectors are required to collect deposit from small depositors and then take the collection to the Bank and make deposit after making relevant entries and fill up all relevant forms and for

such services rendered by them they get commission. It is observed by the Hon'ble Supreme Court that the work of Deposit Collector was manual in as much as they had to make collection by going from place to place and from depositor to depositor and that it was also clerical in as much as they had to fill up various forms, accounts, registers and Pass Books everyday.

In B. S. Kurup's case (supra), it is held that a Sales Representative is not a 'workman'. Form the judgement it is found that the duties of the petitioner therein were to collect orders from the Shop Keepers as well as from dealers of articles, to place orders with the company and to see that the goods are supplied to the parties, to collect payment on behalf of the company and to place the grievance of the dealers with the company. Hon'ble Bombay High Court upheld the finding of the Labour Court that the main functions of the petitioner therein were that of selling of bicycles of the company as a Sales Representative.

In Burmah-Shell Oil Storage and Distributing Co. of India Ltd. *Vrs* Burmah-Shell Management Staff Association, AIR 1971 (S.C.) 922, it is held that the District Sales Representatives of the company are not 'workmen' within the meaning of the Act. The District Sales Representatives of that case were found to be principally employed for the purpose of promoting sales of the company. Their main work was to do canvassing and obtain orders. Even though while discharging that duty they used to carry on some correspondence but that correspondence was incidental to the main work of pushing sales of the company. They were infact found to be company's representative in their respective district, responsible for all matters affecting the company's interest and in particular the profitable sale of its products.

11. In order to be taken as a 'workman' of an industry, the employee of the industry must be shown to have been engaged to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, but he must not be a person coming within sub-clauses (i) to (iv) of clause (s) of Section 2 of the Act. In order to hold that the second party was a 'workman' it is to be thrashed-out whether he was employed to do the kind of works narrated hereinbefore. The main work of the second party was canvassing and holding demonstrations to promote sale of the company's products. In Burmah-Shell's case (supra), their Lordships have held that the District Sales Representative who is principally employed for the purpose of promoting sales of the company is not a 'workman' in as much as, his work cannot be held to be either manual, clerical, technical or supervisory. It is further held that the work of canvassing and promoting sales cannot be included in any of these four classifications. Therefore, it is to be considered as to whether the second party's work is in the nature of unskilled, skilled or operational. It is not operational in the sense that the second party was not engaged in the company's factory.

Since it is therein Clause-H of the contract (Ext.A) that the management would train the second party appropriately for the services to be rendered by him, it is to be presumed that he had acquired some skill for the purpose of demonstration and therefore, this Tribunal is of the considered view that he was a skilled worker.

The second party cannot be equated with a Deposit Collector in the Bank in as much as, he was not required to perform any other work except canvassing and holding demonstration for

promoting sale of the company's product. However, his job to some extent is akin to that of a District Sales Representative of the management of Burma-Shell but unlike the District Sales Representative he was not in the capacity of the company's representative responsible for all matters affecting the company's interest. The second party used to be paid commission on the basis of sale of items of company's different products besides travelling expenses and some other allowances. As it is held that he was engaged to work as a skilled person to promote products of the company, he is held to be a 'workman'.

12. Though in the contract (Ext. A) it is stipulated that either party may terminate the contract without notice and without assigning any reason, the action of the first party in refusing employment to the second party without compliance of Section 25-F of the Act is held to be not in accordance with law. Since the second party is held to be a 'workman' as defined in the Act, the termination of his service without notice, or, notice pay and retrenchment benefit is illegal despite of a term in the contract to the contrary.

13. *ISSUE No. (ii)*—The second party claims for his reinstatement with back wages. Form the nature of the contract it is found that the second party was not a regular employee of the first party. He used to get commission on the basis of sale of items of the company's products. Since it is not a case of regular employment, the principle on relief to be granted to the daily-rated workers may be made applicable while deciding the relief to be extended to the second party. The second party was employed for a period of less than two years. For more than twelve years he has not rendered any service to the first party. Therefore, relying on *Ashok Kumar Sharma Vs. Oberoi Flight Services, AIR 2010 (S.C.) 502*, this Tribunal considers it to be just and appropriate to compensate the workman in lieu of reinstatement with back wages. He was about 28 years old by the time he was disengaged by the first party. There is no evidence on his gainful employment. He being an educated and able bodied person it cannot be presumed that he remained unemployed during the relevant period. In the facts and circumstances, the management be asked to pay a compensation of Rs. 1,00,000 (Rupees one lakh) only to the second party. The management should pay the compensation amount to the second party within a period of three months of publication of the Award in the Official Gazette.

The reference is answered accordingly.

Dictated and corrected by me.

RAGHUBIR DASH

30-10-2010

Presiding Officer

Industrial Tribunal, Bhubaneswar

RAGHUBIR DASH

30-10-2010

Presiding Officer

Industrial Tribunal, Bhubaneswar

By order of the Governor

P. K. PANDA

Under-Secretary to Government